

AMENDED IN ASSEMBLY MAY 20, 2013

AMENDED IN ASSEMBLY MAY 2, 2013

AMENDED IN ASSEMBLY APRIL 22, 2013

AMENDED IN ASSEMBLY APRIL 3, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

## **ASSEMBLY BILL**

**No. 401**

**Introduced by Assembly Member Daly  
(Coauthor: Assembly Member Linder)**

February 15, 2013

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An act to add and repeal Chapter 6.5 (commencing with Section 6820) of Part 1 of Division 2 of the Public Contract Code, relating to highways, and making an appropriation therefor.

### LEGISLATIVE COUNSEL'S DIGEST

AB 401, as amended, Daly. Public contracts: design-build: State Highway Route 405.

Existing law, until January 1, 2014, authorizes certain state and local transportation entities, if authorized by the California Transportation Commission, to use a design-build process for contracts on transportation projects, as specified. Existing law establishes a procedure for submitting bids that includes a requirement that design-build entities provide a statement of qualifications submitted to the transportation entity that is verified under oath, subject to penalty of perjury.

This bill, until January 1, 2018, would authorize the Orange County Transportation Authority to utilize design-build procurement for the Interstate 405 Improvement Project on the state highway system, based on either best value or lowest responsible bid. The bill would require

the Department of Transportation to perform construction inspection services for the project, as specified. The bill would require a transportation entity, as defined, awarding a contract for a public works project pursuant to these provisions, to reimburse the Department of Industrial Relations for costs of performing prevailing wage monitoring and enforcement of the public works project and would require moneys collected to be deposited into the State Public Works Enforcement Fund, a continuously appropriated fund. By depositing money in a continuously appropriated fund, the bill would make an appropriation.

The bill would make findings and declarations as to the necessity of a special statute for Orange County.

Because the bill would extend the use of design-build procurement to the authority, subject to existing procedures, the bill would, by extension, impose the statement of qualifications requirement upon the authority, subject to penalty of perjury, thereby creating a new crime and imposing a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: yes. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. Chapter 6.5 (commencing with Section 6820) is  
2 added to Part 1 of Division 2 of the Public Contract Code, to read:

3  
4 CHAPTER 6.5. ORANGE COUNTY TRANSPORTATION AUTHORITY  
5 DESIGN-BUILD PROGRAM  
6

7 6820. For purposes of this chapter, the following definitions  
8 apply:

9 (a) "Best value" means a value determined by objective criteria,  
10 including, but not limited to, price, features, functions, life-cycle  
11 costs, and other criteria deemed appropriate by the transportation  
12 entity.

13 (b) "Commission" means the California Transportation  
14 Commission.

1 (c) “Design-build” means a procurement process in which both  
2 the design and construction of a project are procured from a single  
3 entity.

4 (d) “Design-build entity” means a partnership, corporation, or  
5 other legal entity that is able to provide appropriately licensed  
6 contracting, architectural, and engineering services as needed  
7 pursuant to a design-build contract.

8 (e) “Design-build team” means the design-build entity itself  
9 and the individuals and other entities identified by the design-build  
10 entity as members of its team.

11 (f) “Department” means the Department of Transportation as  
12 established under Part 5 (commencing with Section 14000) of  
13 Division 3 of Title 2 of the Government Code.

14 (g) “Transportation entity” means the Orange County  
15 Transportation Authority.

16 6821. (a) The Orange County Transportation Authority may  
17 utilize design-build procurement for the Interstate 405  
18 Improvement Project on the state highway system, based on either  
19 best value or lowest responsible bid.

20 (b) Notwithstanding any other provision of this chapter, the  
21 department shall perform construction inspection services for the  
22 project authorized pursuant to this section. Department construction  
23 inspection services for the project authorized pursuant to this  
24 section include, but are not limited to, surveying, material source  
25 testing, certification testing, monitoring of environmental  
26 compliance, independent quality control testing and inspection,  
27 and quality assurance audits. The department construction  
28 inspection duties and responsibilities shall include a direct reporting  
29 relationship between the inspectors and senior department  
30 engineers responsible for all inspectors and construction inspection  
31 services. The senior department engineer responsible for  
32 construction inspection services shall be responsible for the  
33 acceptance or rejection of the work.

34 (c) Notwithstanding any other law, the department shall retain  
35 the authority to stop the contractor’s operation wholly or in part  
36 and take appropriate action when public safety is jeopardized. The  
37 department shall ensure that public safety and convenience is  
38 maintained whenever work is performed under an encroachment  
39 permit within the state highway right-of-way, including, but not  
40 limited to, work performed that includes lane closures, signing,

1 work performed at night, detours, dust control, temporary pavement  
2 quality, crash cushions, temporary railings, pavement transitions,  
3 falsework, shoring, and delineation. The department shall regularly  
4 inspect the job sites for safety compliance and any possible  
5 deficiencies. If any deficiency is observed, a written notice shall  
6 be sent by the department to the Orange County Transportation  
7 Authority's designated resident engineer to correct the deficiency.  
8 Once the deficiency is corrected, a written notice describing the  
9 resolution of the deficiency shall be sent to the department and  
10 documented.

11 (d) The department shall use department employees or  
12 consultants under contract with the department to perform the  
13 services described in subdivisions (b) and (c), consistent with  
14 Article XXII of the California Constitution. Department employee  
15 and consultant resources necessary for the performance of those  
16 services, including personnel requirements, shall be included in  
17 the department's capital outlay support program for workload  
18 purposes in the annual Budget Act.

19 (e) (1) Not later than the first day of July that occurs two years  
20 after a design-build contract is awarded, and each July 1 thereafter  
21 until the project is completed, the Orange County Transportation  
22 Authority shall submit a report on the progress of the project and  
23 compliance with this section to the legislative policy committees  
24 having jurisdiction over transportation matters.

25 (2) The requirement of submitting a report imposed under  
26 paragraph (1) is inoperative on the first day of July four years after  
27 the first report was submitted, pursuant to Section 10231.5 of the  
28 Government Code.

29 (3) A report to be submitted pursuant to paragraph (1) shall be  
30 submitted in compliance with Section 9795 of the Government  
31 Code.

32 6822. The commission shall ~~develop guidelines for a use the~~  
33 *guidelines developed pursuant to subdivision (e) of Section 6803,*  
34 *as it read on December 31, 2013, to provide a standard*  
35 *organizational conflict-of-interest policy, consistent with applicable*  
36 *law, regarding the ability of a person or entity, that performs*  
37 *services for the transportation entity relating to the solicitation of*  
38 *a design-build project, to submit a proposal as a design-build entity,*  
39 *or to join a design-build team. This conflict-of-interest policy shall*

1 apply to ~~each~~ *the* transportation entity entering into design-build  
2 contracts authorized under this chapter.

3 6823. (a) For contracts for public works projects awarded prior  
4 to the effective date of the regulations adopted by the Department  
5 of Industrial Relations pursuant to subdivision (g) of Section 1771.5  
6 of the Labor Code, a transportation entity authorized to use the  
7 design-build method of procurement shall establish and enforce a  
8 labor compliance program containing the requirements outlined  
9 in Section 1771.5 of the Labor Code or shall contract with a third  
10 party to operate a labor compliance program containing the  
11 requirements outlined in Section 1771.5 of the Labor Code. This  
12 requirement shall not apply to projects where the transportation  
13 entity or design-build entity has entered into any collective  
14 bargaining agreement that binds all of the contractors performing  
15 work on the projects.

16 (b) For contracts for public works projects awarded on or after  
17 the effective date of the regulations adopted by the Department of  
18 Industrial Relations pursuant to subdivision (g) of Section 1771.5  
19 of the Labor Code, the transportation entity shall reimburse the  
20 Department of Industrial Relations for its reasonable and directly  
21 related costs of performing prevailing wage monitoring and  
22 enforcement on public works projects pursuant to rates established  
23 by the Department of Industrial Relations as set forth in subdivision  
24 (h) of Section 1771.5 of the Labor Code. All moneys collected  
25 pursuant to this subdivision shall be deposited in the State Public  
26 Works Enforcement Fund, created by Section 1771.3 of the Labor  
27 Code, and shall be used only for enforcement of prevailing wage  
28 requirements on those projects.

29 (c) In lieu of reimbursing the Department of Industrial Relations  
30 for its reasonable and directly related costs of performing  
31 monitoring and enforcement on public works projects, the  
32 transportation entity may elect to continue operating an existing  
33 previously approved labor compliance program to monitor and  
34 enforce prevailing wage requirements on the project if it has either  
35 not contracted with a third party to conduct its labor compliance  
36 program and requests and receives approval from the department  
37 to continue its existing program or it enters into a collective  
38 bargaining agreement that binds all of the contractors performing  
39 work on the project and that includes a mechanism for resolving  
40 disputes about the payment of wages.

1     6824. The procurement process for the design-build project  
2 shall progress as follows:

3     (a) The transportation entity shall prepare a set of documents  
4 setting forth the scope and estimated price of the project. The  
5 documents may include, but need not be limited to, the size, type,  
6 and desired design character of the project, performance  
7 specifications covering the quality of materials, equipment,  
8 workmanship, preliminary plans, and any other information deemed  
9 necessary to describe adequately the transportation entity's needs.  
10 The performance specifications and any plans shall be prepared  
11 by a design professional who is duly licensed and registered in  
12 California.

13     (b) Based on the documents prepared as described in subdivision  
14 (a), the transportation entity shall prepare a request for proposals  
15 that invites interested parties to submit competitive sealed proposals  
16 in the manner prescribed by the transportation entity. The request  
17 for proposals shall include, but need not be limited to, the following  
18 elements:

19     (1) Identification of the basic scope and needs of the project or  
20 contract, the estimated cost of the project, the methodology that  
21 will be used by the transportation entity to evaluate proposals,  
22 whether the contract will be awarded on the basis of the lowest  
23 responsible bid or on best value, and any other information deemed  
24 necessary by the transportation entity to inform interested parties  
25 of the contracting opportunity.

26     (2) Significant factors that the transportation entity reasonably  
27 expects to consider in evaluating proposals, including, but not  
28 limited to, cost or price and all nonprice-related factors.

29     (3) The relative importance or the weight assigned to each of  
30 the factors identified in the request for proposals.

31     (4) For transportation entities authorized to utilize best value  
32 as a selection method, the transportation entity reserves the right  
33 to request proposal revisions and hold discussions and negotiations  
34 with responsive bidders and shall so specify in the request for  
35 proposals and shall publish separately or incorporate into the  
36 request for proposals applicable rules and procedures to be  
37 observed by the transportation entity to ensure that any discussions  
38 or negotiations are conducted in good faith.

39     (c) Based on the documents prepared under subdivision (a), the  
40 transportation entity shall prepare and issue a request for

1 qualifications in order to prequalify the design-build entities whose  
2 proposals shall be evaluated for final selection. The request for  
3 qualifications shall include, but need not be limited to, the  
4 following elements:

5 (1) Identification of the basic scope and needs of the project or  
6 contract, the expected cost range, the methodology that will be  
7 used by the transportation entity to evaluate proposals, the  
8 procedure for final selection of the design-build entity, and any  
9 other information deemed necessary by the transportation entity  
10 to inform interested parties of the contracting opportunity.

11 (2) (A) Significant factors that the transportation entity  
12 reasonably expects to consider in evaluating qualifications,  
13 including technical design and construction expertise, skilled labor  
14 force availability, and all other nonprice-related factors.

15 (B) For purposes of subparagraph (A), skilled labor force  
16 availability shall be determined by the existence of an agreement  
17 with a registered apprenticeship program, approved by the  
18 California Apprenticeship Council, that has graduated at least one  
19 apprentice in each of the preceding five years. This graduation  
20 requirement shall not apply to programs providing apprenticeship  
21 training for any craft that was first deemed by the Department of  
22 Labor and the Department of Industrial Relations to be an  
23 apprenticeable craft within the five years prior to the effective date  
24 of this article.

25 (3) A standard form request for statements of qualifications  
26 prepared by the transportation entity. In preparing the standard  
27 form, the transportation entity may consult with the construction  
28 industry, the building trades and surety industry, and other public  
29 agencies interested in using the authorization provided by this  
30 chapter. The standard form shall require information including,  
31 but not limited to, all of the following:

32 (A) If the design-build entity is a partnership, limited  
33 partnership, joint venture, or other association, a listing of all of  
34 the partners, general partners, or association members known at  
35 the time of statement of qualification submission who will  
36 participate in the design-build contract.

37 (B) Evidence that the members of the design-build entity have  
38 completed, or demonstrated the experience, competency, capability,  
39 and capacity to complete projects of similar size, scope, or  
40 complexity, and that proposed key personnel have sufficient

1 experience and training to competently manage and complete the  
2 design and construction of the project, and a financial statement  
3 that assures the transportation entity that the design-build entity  
4 has the capacity to complete the project.

5 (C) The licenses, registration, and credentials required to design  
6 and construct the project, including, but not limited to, information  
7 on the revocation or suspension of any license, credential, or  
8 registration.

9 (D) Evidence that establishes that the design-build entity has  
10 the capacity to obtain all required payment and performance  
11 bonding, liability insurance, and errors and omissions insurance.

12 (E) Information concerning workers' compensation experience  
13 history and a worker safety program.

14 (F) A full disclosure regarding all of the following that are  
15 applicable:

16 (i) Any serious or willful violation of Part 1 (commencing with  
17 Section 6300) of Division 5 of the Labor Code or the federal  
18 Occupational Safety and Health Act of 1970 (Public Law 91-596),  
19 settled against any member of the design-build entity.

20 (ii) Any debarment, disqualification, or removal from a federal,  
21 state, or local government public works project.

22 (iii) Any instance where the design-build entity, or its owners,  
23 officers, or managing employees submitted a bid on a public works  
24 project and were found to be nonresponsive or were found by an  
25 awarding body not to be a responsible bidder.

26 (iv) Any instance where the design-build entity, or its owners,  
27 officers, or managing employees defaulted on a construction  
28 contract.

29 (v) Any violations of the Contractors' State License Law, as  
30 described in Chapter 9 (commencing with Section 7000) of  
31 Division 3 of the Business and Professions Code, including alleged  
32 violations of federal or state law regarding the payment of wages,  
33 benefits, apprenticeship requirements, or personal income tax  
34 withholding, or Federal Insurance Contribution Act (FICA)  
35 withholding requirements settled against any member of the  
36 design-build entity.

37 (vi) Any bankruptcy or receivership of any member of the  
38 design-build entity, including, but not limited to, information  
39 concerning any work completed by a surety.



1 (vii) Any settled adverse claims, disputes, or lawsuits between  
2 the owner of a public works project and any member of the  
3 design-build entity during the five years preceding submission of  
4 a bid under this article, in which the claim, settlement, or judgment  
5 exceeds fifty thousand dollars (\$50,000). Information shall also  
6 be provided concerning any work completed by a surety during  
7 this five-year period.

8 (G) If the proposed design-build entity is a partnership, limited  
9 partnership, joint-venture, or other association, a copy of the  
10 organizational documents or agreement committing to form the  
11 organization, and a statement that all general partners, joint venture  
12 members, or other association members agree to be fully liable for  
13 the performance under the design-build contract.

14 (H) An acceptable safety record. A bidder's safety record shall  
15 be deemed acceptable if its experience modification rate for the  
16 most recent three-year period is an average of 1.00 or less, and its  
17 average total recordable injury/illness rate and average lost work  
18 rate for the most recent three-year period does not exceed the  
19 applicable statistical standards for its business category or if the  
20 bidder is a party to an alternative dispute resolution system as  
21 provided for in Section 3201.5 of the Labor Code.

22 (4) The information required under this subdivision shall be  
23 verified under oath by the design-build entity and its members in  
24 the manner in which civil pleadings in civil actions are verified.  
25 Information required under this subdivision that is not a public  
26 record under the California Public Records Act, as described in  
27 Chapter 3.5 (commencing with Section 6250) of Division 7 of  
28 Title 1 of the Government Code, shall not be open to public  
29 inspection.

30 (d) For those projects utilizing low bid as the final selection  
31 method, the competitive bidding process shall result in lump-sum  
32 bids by the prequalified design-build entities. Awards shall be  
33 made to the lowest responsible bidder.

34 (e) For those projects utilizing best value as a selection method,  
35 the design-build competition shall progress as follows:

36 (1) Competitive proposals shall be evaluated by using only the  
37 criteria and selection procedures specifically identified in the  
38 request for proposals. However, the following minimum factors  
39 shall be weighted as deemed appropriate by the contracting  
40 transportation entity:

1 (A) Price.

2 (B) Technical design and construction expertise.

3 (C) Life-cycle costs over 15 years or more.

4 (2) Pursuant to subdivision (b), the transportation entity may  
5 hold discussions or negotiations with responsive bidders using the  
6 process articulated in the transportation entity's request for  
7 proposals.

8 (3) When the evaluation is complete, the top three responsive  
9 bidders shall be ranked sequentially based on a determination of  
10 value provided.

11 (4) The award of the contract shall be made to the responsible  
12 bidder whose proposal is determined by the transportation entity  
13 to have offered the best value to the public.

14 (5) Notwithstanding any other provision of this code, upon  
15 issuance of a contract award, the transportation entity shall publicly  
16 announce its award, identifying the contractor to whom the award  
17 is made, along with a written decision supporting its contract award  
18 and stating the basis of the award. The notice of award shall also  
19 include the transportation entity's second- and third-ranked  
20 design-build entities.

21 (6) The written decision supporting the transportation entity's  
22 contract award, described in paragraph (5), and the contract file  
23 shall provide sufficient information to satisfy an external audit.

24 6825. (a) The design-build entity shall provide payment and  
25 performance bonds for the project in the form and in the amount  
26 required by the transportation entity, and issued by a California  
27 admitted surety. In no case shall the amount of the payment bond  
28 be less than the amount of the performance bond.

29 (b) The design-build contract shall require errors and omissions  
30 insurance coverage for the design elements of the project.

31 6826. (a) The transportation entity, in each design-build request  
32 for proposals, may identify specific types of subcontractors that  
33 must be included in the design-build entity statement of  
34 qualifications and proposal. All construction subcontractors that  
35 are identified in the proposal shall be afforded all the protections  
36 of Chapter 4 (commencing with Section 4100) of Part 1 of Division  
37 2.

38 (b) In awarding subcontracts not listed in the request for  
39 proposals, the design-build entity shall do all of the following:

1 (1) Provide public notice of availability of work to be  
2 subcontracted in accordance with the publication requirements  
3 applicable to the competitive bidding process of the transportation  
4 entity.

5 (2) Provide a fixed date and time on which the subcontracted  
6 work will be awarded.

7 (3) Establish reasonable qualification criteria and standards.

8 (4) Provide that the subcontracted construction work shall be  
9 awarded either on a best value basis or to the lowest responsible  
10 bidder. For construction work awarded on a best value basis, the  
11 design-build entity shall evaluate all bids utilizing the factors  
12 described in paragraph (1) of subdivision (e) of Section 6824, and  
13 shall award the contract to the bidder determined by the  
14 design-build entity to have offered the best value.

15 (c) Subcontractors awarded subcontracts under this chapter shall  
16 be afforded all the protections of Chapter 4 (commencing with  
17 Section 4100) of Part 1 of Division 2.

18 6827. Nothing in this chapter affects, expands, alters, or limits  
19 any rights or remedies otherwise available at law.

20 6828. The provisions of this chapter are severable. If any  
21 provision of this chapter or its application is held invalid, that  
22 invalidity shall not affect other provisions or applications that can  
23 be given effect without the invalid provision or application.

24 6829. This chapter shall remain in effect only until January 1,  
25 2018, and as of that date is repealed, unless a later enacted statute,  
26 that is enacted before January 1, 2018, deletes or extends that date.

27 SEC. 2. The Legislature finds and declares that a special law  
28 is necessary and that a general law cannot be made applicable  
29 within the meaning of Section 16 of Article IV of the California  
30 Constitution because of the unique need to build and improve  
31 highways located in the County of Orange in a cost-effective  
32 manner.

33 SEC. 3. No reimbursement is required by this act pursuant to  
34 Section 6 of Article XIII B of the California Constitution because  
35 the only costs that may be incurred by a local agency or school  
36 district will be incurred because this act creates a new crime or  
37 infraction, eliminates a crime or infraction, or changes the penalty  
38 for a crime or infraction, within the meaning of Section 17556 of  
39 the Government Code, or changes the definition of a crime within

- 1 the meaning of Section 6 of Article XIII B of the California
- 2 Constitution.

O